

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

OAH Case No. L 2005120333

WILLIAM K.

Claimant,

vs.

FRANK D. LANTERMAN
REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Chris Ruiz, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on January 5 and 22, 2007, and March 7, 2007, in Los Angeles.

Claimant William K.¹ (Claimant) was represented by Frank John Piro, Attorney at Law.

Frank D. Lanterman Regional Center (FLRC, Regional Center, or Service Agency) was represented by Pat Huth, Attorney at Law.

The record was left open until April 11, 2007, in order for the parties to submit closing briefs. Thereafter, on April 11, 2007, the parties participated in a teleconference with ALJ Ruiz and it was stipulated that the closing briefs would be due on April 25, 2007, and that this decision would be due by May 14, 2007. At the teleconference the following exhibits submitted by Respondent were discussed and the Regional Center had no objection to their admission into evidence. The book "Autism Spectrum Disorders" was marked and admitted as Exhibit 8. The transcript of the hearing was marked and admitted as Exhibit 9.

¹ Only Claimant's first initial of his last name is used to protect his privacy and that of his family. For that same reason, only the first initial of the last name(s) will be used for Claimant's family members.

Regional Center's closing brief was received and marked as Exhibit N. Claimant's closing brief was received and marked as Exhibit 7.

ISSUE PRESENTED

Is Claimant eligible for Regional Center services?²

EVIDENCE RELIED ON

Documents: Claimant's Exhibits 1-9; Regional Center's Exhibits A-N.

Testimony: Claimant's Witnesses – Pegeen Cronin, Karena K. (Sister), Dennis O'Brien, and Barbara R. (Mother). Regional Center's Witnesses – Timothy D. Collister, Joann Bernal, Hasmig Mandossian, and Jean Johnson.

FACTUAL FINDINGS

Procedural History

1. Claimant contends that he is eligible for services from the Regional Center because he has the qualifying condition of autism and/or a disabling condition closely related to mental retardation or a disabling condition which requires treatment similar to that required for individuals with mental retardation.³ Regional Center contends that Claimant is not eligible under either of these two categories, but rather, has a diagnosis of Schizoaffective Disorder or Polysubstance Abuse.

2. On October 28, 2005, the Regional Center advised Claimant that its interdisciplinary team had determined that Claimant did not have an eligible developmental disability as defined by the Lanterman Act. (Exhibit B.)

3. On November 15, 2005, Claimant filed a Fair Hearing Request. (Exhibit C.)

Claimant's History

4. Claimant is a 29-year-old male. He grew up in northern California. According to his mother, Claimant always met his developmental milestones. As a young

² The evidence presented clarified the issue as: "Does Claimant have the developmental disability of autism or a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation (otherwise known as the "Fifth Category") entitling him to eligibility for Regional Center services under the Lanterman Act?"

³ This condition closely related to mental retardation will hereinafter be referred to as the Fifth Category.

child, Claimant had a terrible drooling problem. Other children would mercilessly tease Claimant about this drooling problem. Claimant played mostly by himself. At age seven he began, without training, to play the piano. As a young child, Claimant was seen by a neurologist, a speech therapist, special education evaluators, music teachers, and other therapists. None of these professionals suggested that Claimant suffered from autism or mental retardation.

5. When he was approximately eight years old, Claimant's parents separated and eventually divorced. This divorce caused Claimant much stress and it was at about this time that he began receiving therapy for his behavioral issues. Nevertheless, Claimant always performed well in school in a typical classroom.

6. As a young adult, Claimant developed a methamphetamine addiction, which lasted ten years (between the ages of 15-25). Claimant's addiction caused him to be homeless for a number of years. In 2003, Claimant entered the Pasadena Recovery Center and he has not used methamphetamine since that time.

Claimant's Psychiatric Hospitalizations

7. Claimant has a history of psychiatric hospitalizations. In 1993, at 17 years of age, he was hospitalized at the McCauley Institute for Adolescents at St. Mary's Hospital. He was evaluated due to aggression and violence against his mother. However he was discharged after one week without a diagnosis.

8. In 1995, Claimant was evaluated at the Langley Porter Institute at the University of California, San Francisco, and was diagnosed with Schizoaffective Disorder. Thereafter, he was homeless for a couple of years until he applied for benefits through Social Security and was found eligible based on a diagnosis of Schizoaffective Disorder.

9. In 2003, Claimant was hospitalized at the Langley Porter Psychiatric Institute for one week. During this time, Claimant was again diagnosed with a psychiatric problem, rather than autism or mental retardation.

Claimant's Drug Use and Present Situation

10. Mother first realized that Claimant was using methamphetamine around the time he turned 18 years of age, when Claimant became homeless. However, she did not know the extent of Claimant's drug problem. Mother felt Claimant was violent and crazy, and that she could not continue to care for him, although she wanted to. Mother later learned that Claimant began using methamphetamine when he was approximately 15 years of age.

11. In November 2003, Claimant entered a drug rehabilitation program in Pasadena. Thereafter, he resided in several half-way houses. Claimant did well in recovery and has not relapsed. Claimant no longer uses illegal drugs.

12. Claimant is presently not taking his prescribed psychiatric medicines. It was not established whether or not Claimant's failure to take his medications affected any doctor's ability to accurately diagnosis his condition.

Facts and Expert Opinion Supporting the Regional Center's Position

13. Dr. Timothy Collister examined Claimant in order to evaluate Claimant's condition. Dr. Collister concluded that Claimant has a severe impairment, but the cause is not autism. Dr. Collister based his opinion on Claimant's history and his observations of Claimant during their meeting as described in Findings 14-17.

14. Claimant suffered a head trauma at six months of age. Thereafter, as a young child, he had a terrible drooling problem which led him to be ostracized by other children. It was not established whether or not the head trauma caused Claimant's drooling problem. Because of his drooling problem, and his being ostracized, Claimant hated himself and became depressed. Dr. Collister concluded that an autistic person would not care what other people said or thought about him.

15. As Claimant grew older, his behavior remained fairly constant. At approximately age eight, Claimant's parents separated and eventually divorced. This came as a shock to Claimant, and his sister, because they were unaware of their parents' troubles until the separation occurred. Claimant described his parents' divorce as extremely traumatic. In later years, Claimant's behavior became increasingly abusive and he could not co-exist with his mother in her household. As such, he went to live with his father. After about a year, Claimant returned to live with his mother and his sister because he could not get along with his father. Thereafter, mother's household was so tumultuous due to Claimant's conduct that his sister ran away from home at age 13.

16. During his interview with Dr. Collister, Claimant was able to communicate and even made jokes. Claimant made good eye contact during the interview and Dr. Collister found Claimant to have an endearing personality. Dr. Collister candidly admitted that Claimant is "tangential," but noted that this does not prohibit Claimant from communicating with others. Claimant also reported to Dr. Collister that he has had girlfriends, at times, and a small group of friends, at times. Dr. Collister concluded that these characteristics are not consistent with a diagnosis of autism.

17. Dr. Collister's review of the medical and school records available reveal that no professional ever diagnosed, or suggested a diagnosis, of autism, mental retardation, or a condition similar to mental retardation. Dr. Collister concluded that Claimant is paranoid and depressed which leads to thought and mood disorders which, in turn, lead to a Schizoaffective Disorder. Dr. Collister concluded that Claimant is substantially handicapped, but not because of a diagnosis of autism.

Facts and Expert Opinion Supporting Claimant's position

18. Dr. Pegeen Cronin concluded that Claimant is autistic. She found that Claimant exhibited 13 of the 14 criteria used in evaluating whether a person can be diagnosed with autism. She testified that autism deficits generally cover three areas: communication, social interaction, and the inability to be "flexible."

19. Dr. Cronin conceded that Claimant was not diagnosed with autism in his early years, but indicated that this is likely because Claimant was verbal and went to a Montessori school, which was very nurturing. She also conceded that Claimant is presently receiving Social Security benefits based on a diagnosis of Schizoaffective Disorder.

20. Dr. Cronin's opinion is not convincing. For example, her written report (page 8) described Claimant's eye contact during her interview with him as "exceptional except during conversation about emotions" However, her written report later states (page 10) that Claimant suffers the qualitative impairment of social interaction "as manifested by marked impairment in use of multiple nonverbal behaviors such as eye-to-eye gaze" Dr. Cronin's conclusion in her written report does not reflect her own observations of Claimant. Further, the ALJ observed Claimant over three separate hearing days. On those days, Claimant appeared calm, spoke clearly to others in the room, and made excellent eye-to-eye contact with others in the hearing room. For this reasoning, Dr. Cronin's opinion and diagnosis is not credible.

21. Dr. Cronin also testified that Claimant has high cognitive functioning, but that Claimant has adaptive skills similar to a person with mental retardation. However, sufficient testimony from Dr. Cronin was not provided at hearing to support this conclusory opinion. Further, this opinion is not stated in her report. Dr. Cronin's report only diagnosed Claimant with autism, and not Fifth Category. Thus, it appears Dr. Cronin did not believe Claimant was eligible on the basis of a Fifth Category diagnosis when she evaluated him. It was not until the hearing that Dr. Cronin first opined that Claimant was eligible under the Fifth Category. For these reasons, it was not established that Claimant is eligible under the Fifth Category.

22. Lastly, Claimant presented evidence and argument that he has many characteristics which are similar to Dennis O'Brien, a consumer of the Regional Center by virtue of his diagnosis of autism. In sum, because they have similar characteristics, Claimant contends that since Mr. O'Brien is eligible for services, so too should Claimant be eligible for services. However, the facts surrounding Mr. O'Brien's determination of eligibility were not established. Further, the issue at hand is whether or not Claimant has established his eligibility. One requirement to establish eligibility on the basis of a diagnosis of autism is sufficient testimony from a qualified professional who is found more credible than the Regional Center's qualified professional. In this case, that did not occur as discussed in Findings 18-20. The same conclusion would be appropriate if the Regional Center had

presented evidence that a person with characteristics similar to Claimant had been found not eligible for services. Each case must be evaluated on its own merits.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welfare and Institutions Code § 4500 et seq.⁴) An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.) Claimant properly and timely requested a fair hearing and therefore jurisdiction for this appeal was established. Factual Findings 1-3.

2. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 (retirement benefits).) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise.

3. The Legislature intended to defer to the California Department of Developmental Services (DDS) and the various regional centers for the implementation of the Lanterman Act. (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) With regard to eligibility, “the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS and RC (regional center) professionals determination as to whether an individual is developmentally disabled.” (*Id.*, at p. 1129.) In the *Mason* case, the court focused on whether the claimant’s expert witnesses’ opinions on eligibility “sufficiently refuted” those expressed by the regional center’s experts. (*Id.*, at p. 1137.)

4. Based on the above, in eligibility cases such as this one, a claimant requesting regional center services has the burden of proving by a preponderance of the evidence that his or her evidence regarding eligibility sufficiently refutes that adduced by the involved regional center.

Claimant Did Not Establish He Has the Qualifying Condition of Autism

5. Eligibility is found under the Lanterman Act when an individual establishes that he suffers from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is commonly known as the "Fifth Category." (§ 4512, subd. (a).) A qualifying condition must onset before one’s 18th birthday and continue indefinitely thereafter. (§ 4512, and Cal. Code Regs., tit. 17, § 54000.)

⁴ All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

6. Excluded from eligibility are handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or disorders solely physical in nature. (Cal. Code of Regs., tit. 17, § 54000.) "Psychiatric disorders" are defined as intellectual or social functioning which originated as a result of a psychiatric disorder, or treatment given for such a disorder. (Cal. Code Regs., tit. 17, § 54000, subd. (c)(1)). "Learning disorders" are defined as a significant discrepancy between estimated cognitive potential and actual level of educational performance which is not "the result of generalized mental retardation, educational or psycho-social deprivation, [or] psychiatric disorder . . . " (Cal. Code Regs., tit. 17, § 54000, subd. (c)(2)). Applicant's suffering from those conditions are excluded from eligibility only when these conditions are solely the cause of a handicap. Therefore, a person with a "dual diagnosis," that is, a developmental disability and a psychiatric disorder or learning disability, may still be eligible for services. However, someone whose conditions are solely from the excluded categories, alone or in some combination, is not eligible.

7. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he suffers from a diagnosis of autism. This condition is typically diagnosed in early childhood. Claimant's school records did not reveal a child with developmental issues or cognitive issues, nor did any of the many professionals he saw ever suggest that Claimant was autistic. Further, Dr. Collister's opinion was more credible than that of Dr. Cronin's. In sum, Claimant's evidence did not sufficiently refute the evidence presented from the Service Agency's in-house assessment team and Dr. Collister that Claimant does not have a diagnosis of autism. (Factual Findings 4-22.)

Claimant Did Not Establish He Has a Qualifying Fifth Category Condition

8. The Fifth Category is described as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals." (§ 4512, subdivision (a).) Section 4512 does not more specifically define what constitutes a fifth category condition. Whereas the first four categories of eligibility are very specific (e.g., autism or cerebral palsy), the disabling conditions under this residual category are intentionally broad to encompass unspecified conditions and disorders. While the Legislature did not more specifically define the Fifth Category, it did require that the condition be "closely related" (§ 4512) or "similar" (Cal. Code Regs., tit. 17, § 54000) to mental retardation. "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.)

9. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he is eligible for services under the Fifth Category. Claimant's school records did not reveal a child with developmental issues or cognitive issues. Claimant does not present as a person with a Fifth Category diagnosis. Dr. Cronin's report only detailed her diagnosis of autism and did not mention a diagnosis of mental retardation or a similar condition. Dr. Cronin did testify at hearing that Claimant has

adaptive skills similar to a person with mental retardation. However, she did not elaborate sufficiently to substantiate and establish her conclusory opinion that Claimant is a person who has a disabling condition found to be closely related to mental retardation or requires treatment similar to that required for individuals with mental retardation. (Factual Findings 4-22.)

ORDER

Claimant William K. did not establish eligibility for services from the Service Agency. Claimant's appeal of the Service Agency's determination that he is not eligible for services is therefore denied.

DATED: May 7, 2007,

/s/
CHRIS RUIZ
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (b)(2). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.